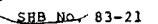
BEFORE THE SHORELINES HEARINGS BOARD STATE OF WASHINGTON 3 IN THE MATTER OF CANCELLATION OF A CEASE AND DESIST ORDER ISSUED BY THE DEPARTMENT OF ECOLOGY TO JOHN A. and ESTER NELSON. 6 LLOYD P. and MARGARET C. FULLER, 7 Appellants, ٧. 9 STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and 10 JOHN A. and ESTER NELSON, 11 Respondents.



ORDER GRANTING SUMMARY JUDGMENT ON GROUNDS OF NO JURISDICTION

On June 16, 1983, respondents John A. and Ester Nelson filed their "Motion for Summary Dismissal of Appellants' Claim" in this matter.

Respondent Department of Ecology joined in support of this motion.

The motion was opposed by appellants Lloyd F. and Margaret C. Puller.

Having heard the oral argument of counsel for all parties on

July 13, 1983, at Lacey, Washington, having read the written

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nemorandum filed by each party together with the records and files nerein, and being fully advised, the Board rules as follows:

- 1. In the prior, companion case to this one, Nelson v. DOE and Fuller, SEB No. 79-11, we reviewed our jurisdiction to hear appeals from shorelines regulatory orders of the Department of Ecology (DOE). Such review was then provided by WAC 173-14-190, a rule promulgated by DOE. We concluded that the Board lacks jurisdiction to hear such appeals. That decision is attached, and incorporated herein by this reference.
- 2. Subsequent to our decision in SHB No. 79-11, above, DOE repealed its rule by conferring jurisdiction upon this Board.
 - 3. There is no genuine issue of material fact in this matter.
- 4. There is no legally significant distinction between the facts of the prior case (SHB No. 79-11), which involved a shoreline regulatory order staying construction, and this case which involves a shoreline regulatory order cancelling the first order. We conclude that the Board lacks jurisdiction to hear this matter and enter the following:

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ORDER

Respondent's Motion for Summary Judgment is granted and this matter is dismissed for lack of jurisdiction.

DONE at Lacey, Washington, this /st day of Quand SHORELINES HEARINGS BOARD

Deuflien
David AKANA, Lawyer Member

(See Dissent)
LAWRENCE J. FAULK, Member

SHB No. 83-21

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PAULK, Member, Dissenting:

This matter came before the Shorelines Hearings Board on motion of appellants. The parties filed written argument and supportive documents.

The laste raised in the notion is whether this Board has jurisdiction to hear and decide the matter(s) raised in the notice of appeal; i.e., whether the issuance by respondent Department of Ecology of an enforcement order is appealable to this Board.

The underlying question is whether such appeals are within the scope of authority delegated to the Shorelines Hearings Board by the legislature in the passage of the Shoreline Management Act of 1971.

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The test for delegation to an administrative tribunal has been states as follows in STASON & COOPER, CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS 5 (3d ed. 1957):

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In a word, then, we look for the rights, duties, powers and privileges of administrative tribunals in either the express language or the implications of statites all construed in the light of prevailing constitutional limitations.

(To the knowledge of this author, there have been no cases in Washington dealing directly with the scope of power of a legislatively created administrative tribunal.) It is reasonable to expect, however, that the Washington courts would fashion a similar test to that quoted above from Stason and Cooper.

In reviewing the authority of one state agency, the no-longer-existent department of Public Service, the State Supreme

Court applied the following test:

It is well settled in this state, as elsewhere, that a public service commission, such as the department of public service in this state, is an administrative agency created by statute and as such has no inherent powers, but only such as have been expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted. State ex rel. P.U.D. v. Dept. of Public Service, 21 Wn.2d 201, 208, 209, 150 P.2d 709 (1944).

It seemes to me that the Shorelines Bearings Board has the necessary jurisdiction by virtue of the above tests. This is true particularly in light of the deference of the appellate courts to the administrative expertise of the Shorelines Bearings Board (Department of Ecology v. Ballard Elks Lodge No. 827, 84 Wn.2d 551, 556, 527 P.2d 1121 (1974)), the stress which that the court has placed on the liberal construction of the Shoreline Management Act (Hayes v. Yount, 37 Wn.2d 441, 446, 447, 536 P.2d 157 (1975)) and to the equally important policy of ensuring uniform, statewide enforcement of the Shoreline Management Act.

The Shoreline Management Act expressly grants authority to tre Shorelines Hearings Board to hear reviews of appeals regarding the granting, denying, or rescission of permits issued under the act, as well as appeals of local governments of master programs. RCW 90.58.180(1) and RCW 90.58.180(4).

It is obvious from reading the statute that the essential area of Board jurisdiction involves individualized shoreline disputes.

26 DISSENT

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It is entirely consistent with this statutory approach to interpret the jurisdiction of the Board broadly to encompass the review of appeals from enforcement orders which are restricted to individualized shoreline disputes. In such appeals, the Board is confined to reviewing precisely the same types of issues that it faces relating to permits.

For the Shorelines Hearings Board to review enforcement orders designed to ensure compliance with the provisions of the Shoreline Management Act is necessarily incidental to the jurisdiction of the Board over other cases involving regulation of development on the shorelines of the state through the permit system.

This state has, through its appellate courts, adopted the federal approach of allowing a delegation of administrative authority in the absence of specific statutory standards, so long as there exist adequate procedural safeguards. Yakima Clean Air v. Glascom Builders, 85 Wh.2d 255, 534 P.2d 33 (1972); Barry & Barry, Inc. v. Department of Motor Venicles, 81 Wh.2d 138, 500 P.2d 540 (1972); Rody v. Hollis, 81 Wh.2d 88, 500 P.2d 97 (1972). As was shown in Yakima, Supra, it is clear that adequate procedural safeguards exist, given the right of the appellant to a contested case hearing, as well as the subsequent right of appeal to the courts under the Washington Administrative Procedure Act. WAC 173-14-190(1) and WAC 173-14-190(2).

DISSENT PCEB No. 83-53 SEB No. 83-21

For the above reasons, I believe that by necessary implication the Board does have the statutory jurisdiction to review enforcement orders of the Department of Ecology.

LAYRENCE J. PAULK, Member Shorelines Hearings Board